Date: August 27, 1997

Case No.: 95-INA-289

In the Matter of:

DR. DANIEL BERNSTEIN, D.D.S.,[1]
Employer

On Behalf Of:

JOZEFA BIDZINSKA,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Huddleston, Neusner, and Rosenzweig
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

**DECISION AND ORDER**

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

[1] The Employer's name appears many different ways in this Appeal File. We have chosen to use this spelling of the Employer's name as it appears this way on his letterhead (AF 41) and his checks (AF 31-36).

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[2] and any written argument of the parties. 20 C.F.R. § 656.27(c).

**Statement of the Case**

On February 16, 1994, Dr. Daniel Bernstein, D.D.S. ("Employer") filed an application for labor certification to enable Jozefa Bidzinska ("Alien") to fill the position of Cook Kosher, Live Out (AF 3-4). The job duties for the position are:

> Prepares, seasons, and cooks soups, meats, vegetables, etc. according to the principles of Kosher Cuisines. Bakes, broils and steam[s] meat, fish and other food. Prepares Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorates dishes according to the nature of celebration. Purchases foodstuff and accounts for the expenses incurred.

The requirements for the position are eight years of grade school, four years of high school, and two years of experience in the job offered.

The CO issued a Notice of Findings on September 8, 1994 (AF 28-30), proposing to deny certification on the grounds that the listed duties for the job offer do not appear to constitute full-time employment in the context of the Employer's household, in violation of § 656.50 (now recodified as § 656.3). The Employer was advised that he could rebut this finding by amending the job duties or by submitting evidence that the job constitutes full-time employment. Additionally, the CO stated that:

> We note that over 90 percent, if not all, of the Applications for Alien Employment Certification for the occupation of Household Cook received with agent Eastern European Council, involve a kosher food preparation experience requirement and almost all identically state that presently 'all cooking duties are performed by my relative who no longer can do this because of personal reasons.' Employer is required to provide <u>evidence and documentation</u> to support the kosher food experience requirement and to support that a relative is currently performing these duties. (Emphasis supplied).

Accordingly, the Employer was notified that it had until October 13, 1994, to rebut the findings or to cure the defects noted.

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[2] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

In his rebuttal, dated September 29, 1994, and submitted under cover letter dated October 12, 1994 (AF 31-41), the Employer stated that his family consists of himself, his wife, and two daughters, ages nine and 16. The Employer further stated that due to their religious background, they only have meals prepared with observance of kosher regulations. Next, the Employer supplied a list of the mealtimes and for whom, and also described the Cook's daily schedule. The Employer contended that the Cook will prepare 20 breakfasts, 20 midday snacks, 10 lunches, 10 evening snacks, and 20 dinners per week, and stated that the Cook will not perform any duties other than cooking and cooking-related duties. The Employer attached copies of checks, which are identified as being written for house cleaning.

Regarding the necessity for hiring a full-time cook, the Employer stated that the cooking duties in the past were performed by his mother-in-law, with assistance from his wife; however, due to his mother-in-law's age and health condition, she can no longer perform these duties, and his wife has increased her workload as her "parenting duties lessened with my daughters growing up." The Employer listed he and his wife's work schedules and his daughters' school schedule.

The Employer addressed the CO's comment regarding the Eastern European Council by stating that the CO's position seems prejudiced against kosher tradition, and that:

> It is well known fact that Eastern Europe is home and cultural origin of many American Jews. It is not unusual that certain organizations cater to certain cultural and ethnic groups as in this case. It should also be noted that each application is an individual case and according to applicable law should be considered on a separate and individual basis. Therefore, your comments in this place seem inappropriate and unlawful.

The CO issued the Final Determination on October 17, 1994 (AF 42-45), denying certification because the Employer's rebuttal fails to establish the full-time nature of this job opportunity and fails to establish it as a customary requirement. Specifically, the Employer provided a daily working schedule for the Cook (not a weekly schedule), which does not appear to be realistic and appears excessive. Additionally, the CO noted that the Employer only provided the face of several checks made out to an individual purported by the Employer to be the house cleaner; he did not provide canceled checks, contracts, bills, or receipts as requested in the NOF. The CO concluded that, "[i]t would appear rather, that an effort is being made to qualify the alien under the 'Skilled Worker' category because of the unavailability of visa numbers in the 'Other Worker' category of employment based preferences."

On November 17, 1994, the Employer requested review of the Denial of Labor Certification (AF 46-55). On February 3, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). Counsel for the Employer submitted a Brief on March 10, 1995.

## Discussion

We note at the outset that the CO's comment regarding labor certification applications received from "agent Eastern European Council" seems to suggest that the CO may have

impermissibly considered matters outside of this record in making this determination. If the CO has reason to believe that a pattern of improper conduct exists, there are other resources, which can be utilized to investigate such conduct. However, in the absence of any evidence of such, each application must be decided upon its own record.

We are also concerned that this job opportunity contains a requirement for two years of specialized cooking experience which could be considered to be unduly restrictive, which does not appear to have been considered by the CO. The job requirements include two years of experience in the job duties of Kosher cooking. The practical effect of this requirement is to eliminate any U.S. applicant with two years of cooking experience, but no experience in Kosher cooking.

Further, we are concerned that the CO's finding regarding the existence of an offer of full-time employment has confused the issue of business necessity (within the context of an unduly restrictive job requirement) with whether the offer of employment is for 40 hours per week of employment.

For these reasons, we cannot conclude that the CO's determination is reasonable or supported by sufficient evidence in the record as a whole. Therefore, this matter will be remanded with instructions to the CO to consider whether the Employer's requirement of two years of experience in cooking Kosher foods is unduly restrictive, thus requiring a showing of business necessity in accordance with 20 C.F.R. § 656.21(b)(2)(i)(B), which provides that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States as defined in the *Dictionary of Occupational Titles* (DOT). On Remand, the CO is also permitted to develop additional evidence if it is believed that full-time employment is not being offered.

**ORDER**

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further action in accordance with this decision.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary

to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk***
***Office of Administrative Law Judges***
***Board of Alien Labor Certification Appeals***
***800 K Street, N.W., Suite 400***
***Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.